NO. 48182-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

ARTHUR WEST, Appellant

v.

PIERCE COUNTY COUNCIL, et al., Respondents

RESPONDENTS' ANSWERING BRIEF

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Table of Contents

Page

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 10

A. WEST LACKS STANDING TO SUE UNDER THE OPMA 10

1. OPMA Does Not Abolish Requirement of Proving Standing 11

2. Trial Court Did Not Hold Division II's Unpublished Decision on Standing Was "Precedent" 13

3. West Did Not Establish He Had Standing Under the OPMA 15

a. Reconsideration Declaration Not Properly Before Court 16

b. A Timely Declaration Would Not Have Proved Standing 18

B. WEST FAILED TO PROVE A VIOLATION OF THE OPMA 20

1. No Evidence a Council Majority Had a "Serial Meeting" 22

2. Council's Later Vote Directing Suit's Dismissal Does Not Bar the Court From Relying on the Record 28

3. Other Grounds for Affirming Dismissal Also Are Present 30

a. Prosecutor's Legal Consultation With Councilmembers Does Not Violate the OPMA 31

b. OPMA Permits Discussion Among Councilmembers About the Subject of a Proposed Special Meeting 37

V. CONCLUSION.....39

Table of Authorities

Page

Cases

Allan v. Univ. of Washington, 140 Wn.2d 323, 327-28, 997 P.2d 360 (2000) 18, 20

Allen v. Wright, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) 11

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 22

Blackford v. Sch. Bd. of Orange County, 375 So.2d 578, 580 (Fla. Dist. Ct. App. 1979) 24

Brower v. Pierce County, 96 Wn. App. 559, 567, 984 P.2d 1036 (1999) 12

Brownfield v. City of Yakima, 178 Wn. App. 850, 870, 316 P.3d 520 (2014) 14

Cedar Grove Composting, Inc. v. City of Marysville, 188 Wn. App. 695, 710, 354 P.3d 249 (2015) 12

Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) 21

Charbonneau v. Wilbur Ellis Co., 9 Wn.App. 474, 476, 512 P.2d 1126 (1973) 3

Citizens All. for Prop. Rights Legal Fund v. San Juan Cty., 184 Wn.2d 428, 443-44, 359 P.3d 753 (2015) 24, 25, 26

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) 18

Coughlin v. Seattle Sch. Dist. No. 1, 27 Wn. App. 888, 893, 621 P.2d 183 (1980) 10

Craig v. Boren, 429 U.S. 190, 193–94,
97 S.Ct. 451, 50 L.Ed.2d 397 (1976) 11

*Del Papa v. Bd. of Regents of the Univ. & Cmty.
Coll. Sys.*, 114 Nev. 388, 956 P.2d 770 (Nevada 1998) 24

Des Moines Marina Ass'n v. City of Des Moines,
124 Wn. App. 282, 291, 100 P.3d 310 (2004) 11

Finch v. Matthews, 74 Wn.2d 161, 175, 443 P.2d 833 (1968) 29, 30

*Foothills Dev. Co. v. Clark Cy. Bd. of Cy.
Comm'rs*, 46 Wn. App. 369, 377 (1986) 8

Hanson v. City of Snohomish, 121 Wn.2d 552,
561, 852 P.2d 295 (1993) 14, 15

Harter v. King Cty., 11 Wn.2d 583, 595,
119 P.2d 919 (1941) 6

High Tide Seafoods v. State, 106 Wn.2d
695, 702, 725 P.2d 411 (1986) 11

Holland v. City of Tacoma, 90 Wn. App.
533, 538, 954 P.2d 290 (1998) 30

In Re Pirtle, 136 Wn.2d 467, 473, 965 P.2d 593 (1998) 2

In re Recall of Lakewood City Council Members,
144 Wn.2d 583, 586-87, 30 P.3d 474 (2001) 35, 36

Joy v. Department of Labor and Industries,
170 Wn. App. 614, 629, 285 P.3d 187 (2012) 30

*Kaech v. Lewis County Public Utility
Dist. No. 1*, 106 Wn. App. 260, 268, 23 P.3d 529 (2001) 17

*Kirk v. Pierce County Fire Protection
Dist. No. 21*, 95 Wn.2d 769, 771-72, 630 P.2d 930 (1981) 12, 13, 14

Kleven v. City of Des Moines, 111 Wn. App.
284, 290, 44 P.3d 887 (2002) 12

Kramarevsky [sic] *v. DSHS*, 122 Wn.2d.
738 [sic] 743 [sic] 863 P 2d 535, [sic] (1992) 29, 30

Larez v. City of Los Angeles,
946 F.2d 630, 642 (9th Cir. 1991) 2

Las v. Yellow Front Stores, Inc.,
66 Wn. App. 196, 198, 831 P.2d 744 (1992) 22

Lujan v. Defenders of Wildlife, 504 U.S. 555,
561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) 11, 12

Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990) 18

McComas v. Bd. of Educ. of Fayette County,
475 S.E.2d 280, 290 (W. Va. 1996) 24

Metz v. Sarandos, 91 Wn. App. 357, 360, 957 P.2d 795 (1998) 17

Morinaga v. Vue, 85 Wn. App. 822, 935 P.2d 637 (1997) 16

Nolan v. Snohomish County, 59 Wn. App. 876, 883, 802 P.2d
792 (1990), *rev. denied,* 116 Wn.2d 1020, 811 P.2d 219 (1991) 7

O'Neill v. Farmers Ins. Co. of Washington,
124 Wn. App. 516, 522, 125 P.3d 134 (2004) 16

Osborn v. Grant County, 130 Wn.2d 615, 626-27 (1996) 4, 6

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326,
99 S. Ct. 645, 58 L. Ed. 2d 552 (1979) 14

Port of Seattle v. Rio, 16 Wn. App. 718,
724-25,559 P.2d 18 (1977) 33, 34, 35

Prentice v. Franklin County, 54 Wash. 587, 591 (1909) 4

Rodriguez v. Loudeye Corp., 144 Wn. App.
709, 728, 189 P.3d 168 (2008) 12

Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors,
69 Cal.Rptr. 480, 487 n. 8, 263 Cal.App.2d 41 (1968) 25, 33, 34, 35

Seiber v. Poulsbo Marine Center, Inc.,
136 Wn. App. 731, 736, 150 P.3d 633 (2007) 22

SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 141, 331 P.3d 40 (2014) 3

Shoemaker v. City of Bremerton, 109 Wn.2d 504, 507 (1987) 15

Sligar v. Odell, 156 Wn. App. 720, 731, 233 P.3d 914 (2010) 22

Smith County Education Association v. Anderson,
676 S.W.2d 328, 334 (Tenn. 1984) 24

Soter v. Cowles Pub. Co., 162 Wn.2d 716, 742, 174 P.3d 60 (2007) 34

Southcenter Joint Venture v. Nat'l Democratic Policy Comm.,
113 Wn.2d 413, 418 (1989) 15

Sprague v. Sumitomo Forestry Co.,
104 Wn.2d 751, 758, 709 P.2d 1200 (1985) 31

State ex rel Pierce County v. King County,
29 Wn.2d 37, 45, 185 P.2d 134 (1947) 2

State St. Office Bldg. v. Sedro Woolley Sch. Dist. No. 101,
57 Wn. App. 657, 789 P.2d 781 (1990) 11

State v. Evans Campaign Comm., 86 Wn.2d 503, 506–07 (1976) 3

State v. Ray, 130 Wn.2d 673, 677, 926 P.2d 904 (1996) 13

State v. Stalker, 152 Wn. App. 805, 811, 219 P.3d 722 (2009) 13

Stockton Newspapers, Inc. v. Members of the Redevelopment Agency,
214 Cal.Rptr. 561, 565, 566 (Cal. Ct. App. 1985) 23, 24, 31, 32

Sutter Sensible Planning, Inc. v. Board of Supervisors,
176 Cal. Rptr. 342, 348 (Cal. Ct. App. 1981) 32, 33, 34

Tender v. Nordstrom, 84 Wn. App. 787, 791, 929 P.2d 1209 (1997) 21

Tortes v. King Cnty., 119 Wn. App. 1, 13–14, 84 P.3d 252 (2003) 2

United States v. SCRAP, 412 U.S. 699, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) 18

Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland, 95 Wn. App. 896, 977 P.2d 639 (1999) 16

Wash. Pub. Trust Advocates v. City of Spokane, 120 Wn. App. 892, 902-903, 86 P.3d 835 (2004) 7, 33

West v. Marzano, 171 Wn. App. 1004 (2012) (unpublished) 14, 15

West v. Secretary of the Department of Transportation, 206 F.3d 920 (9th Cir. 2000) 19

West v. Thurston County, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) 30

Wood v. Battle Ground School Dist., 107 Wn. App. 550, 558, 27 P.3d 1208 (2001) ..... passim

Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989), overruled on other grounds, 130 Wn.2d 160, 922 P.2d 69 (1996) 21

Statutes

RCW 2.06.040 13

RCW 5.60.060(2)(a) 33

RCW 7.24 7

RCW 36.01.020 8

RCW 36.27.020(1) 4

RCW 36.27.020(3) 4

RCW 36.27.020(4) 4

RCW 36.32.120(6) 4, 8

RCW 42.30.020(3) 2, 4, 27, 28

RCW 42.30.080 ..... 37, 38

RCW 42.30.080(1) 37

RCW 42.30.080(3) 37

RCW 42.30.110(1)(i) 33, 36

RCW 42.30.130 ..... 11, 15

Other Authorities

1971 444 Op. Att'y Gen. No. 33, at 19 25

8 Wigmore (on Evidence (McNaughton rev. 1961) s 2291, p. 553 33

PCC 1.28.040B 37

Rules

CR 59 ..... 16, 17

CR 59(b) 17

ER 801(c) 3

ER 802 3

ER 805 3

GR 14.1 13

RAP 5.2(e) 17

RAP 10.3(a)(6) 30

RAP 10.4(f) 30

I. INTRODUCTION

Arthur West appeals the summary judgment dismissal of his Open Public Meetings Act (hereinafter "OPMA") suit. Mr. West, however, lacked standing to sue, mistakenly named as defendant the non-legal entity "Pierce County Council," failed to serve two named councilmembers, and could not demonstrate under the law or record how any defendant violated the OPMA. Dismissal was therefore proper and should be affirmed.

II. RESTATEMENT OF THE ISSUES

A. Was Mr. West's OPMA claim properly dismissed when, in response to defendants' motion for summary judgment, he failed to present evidence establishing he had standing to bring such an action?

B. Was Mr. West's OPMA claim properly dismissed when, in response to defendants' motion for summary judgment, he failed to present evidence establishing the OPMA had been violated?

III. STATEMENT OF THE CASE

On March, 5, 2015, Plaintiff Arthur West filed a complaint naming in its caption as defendants the "Pierce County Council" and six of its seven councilmembers: *i.e.* Rick Talbert, Joyce McDonald, Jim McCune, Connie Ladenburg, Douglas Richardson and Derek Young. CP 268.[1] The

[1] The text of the complaint, however, made no mention of any of these named councilmembers, described no act or failure to act by them, and listed as the only "parties"

complaint's "allegations" were that "[o]n or about February 25 to March 3, 2015, the Pierce County Prosecutor Mark Lindquist [who was not listed as a defendant in its caption or the paragraphs identifying "parties"] deliberately facilitated a series of serial 'meetings' through which a quorum of the Council took 'action' as defined in RCW 42.30.020 (3) in violation of the Open Public Meetings Act" – but it did not describe the members who made up the supposed "quorum" or what "action" it claims they took. CP 269.

The complaint speculated the supposed violation "may have been willing and 'knowing' on the part of a quorum" of unidentified council members. *Id.* However, the complaint admitted its allegations were based only on matters "reported in the media" – and included as an "attachment" a "TNT News Article of Mrch [sic] 3, 2015," describing the County's filing suit to oppose a referendum. CP 268-69, 272-73. Though the article was not evidence,[2] it also did not support the complaint's conclusory allegations.

Mr. West himself and the "Pierce County Council" – which is not a legal entity capable of being sued. CP 269. *See infra* at p. 7 n. 8.

[2] As a matter of law, where a newspaper "article is offered to prove the truth of the matters stated herein, it is properly excluded as hearsay." *Tortes v. King Cnty.*, 119 Wn. App. 1, 13–14, 84 P.3d 252 (2003). *See also State ex rel Pierce County v. King County*, 29 Wn.2d 37, 45, 185 P.2d 134 (1947) ("newspaper articles are hearsay and inadmissible as evidence to prove the truth of the statements contained therein"); *In Re Pirtle*, 136 Wn.2d 467, 473, 965 P.2d 593 (1998)(newspaper articles properly stricken as "hearsay and incompetent evidence."); *Larez v. City of Los Angeles*, 946 F.2d 630, 642 (9th Cir. 1991) ("newspaper articles have been held inadmissible hearsay as to their content."). Further, the article repeated various out of court statements by other persons so that both the news article itself and the repetition of supposed statements of others were inadmissible hearsay because they

Instead, the only admissible evidence shows that on February 24, 2015, the Pierce County Executive advised members of the Pierce County Council by email that the Prosecuting Attorney's Office had determined that a proposed citizen's referendum to repeal a construction funding ordinance was "beyond the scope of the referendum process as outlined in the Pierce County Charter." *See* CP 22. Thereafter, in response to a February 25 question by a Council member about this legal conclusion, on February 26 the Pierce County Prosecuting Attorney's Chief Civil Deputy Douglas Vanscoy emailed council members near the end of the work day a confirmation of his office's opinion. *See* CP 22 - 23. In so doing, as was his statutory duty, Chief Civil Deputy Vanscoy advised the chairman and council members that the "Executive has requested that a lawsuit challenging the proposal be filed forthwith," and that "[b]ecause this involves an ordinance, we are also requesting instruction from the Council before proceeding" as required by statute and precedent but that "[d]irection

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too were statements "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). *See also* ER 802. The repeating of a reporter's description of a statement by others is inadmissible hearsay upon hearsay. *See* ER 805. Therefore, this or any "media report" was not admissible because the repetition of hearsay "does not suffice" to oppose summary judgment. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40 (2014) (citing *State v. Evans Campaign Comm.*, 86 Wn.2d 503, 506–07 (1976), which explains that such a report "does not create a material issue of fact"); *Charbonneau v. Wilbur Ellis Co.*, 9 Wn.App. 474, 476, 512 P.2d 1126 (1973) (hearsay is "not competent evidence" in opposition to summary judgment motion).

from the Chair would be sufficient." CP 23.[3] The Executive had directed suit be filed because the referendum was unauthorized and would have significantly increased by several million dollars the long term cost to taxpayers of a planned building project if not expeditiously challenged. *See id.*

Contrary to the complaint's creative misinterpretation of the "media reports" it claimed to rely upon, the record demonstrates that in requesting direction about filing suit, the Prosecutor did not "deliberately facilitate[] a series of serial 'meetings' through which a quorum of the Council took 'action' as defined in RCW 42.30.020 (3) …in violation of the Open Public Meetings Act." CP 269. Rather, after the Prosecutor's February 26, 2015, email, and before the County filed suit at 4:25 p.m. the next day, CP 24, the only communications between council members and the Prosecutor's Office occured on February 27, 2015, concerning for the most part legal questions about the Council's authority to act, and were as follows:

1. **11:35 a.m.**: Councilmember Joyce McDonald emailed the Prosecutor's Office, with copies to Chairman Dan Roach and the

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[3] *See, e.g., Osborn v. Grant County*, 130 Wn.2d 615, 626-27 (1996) (because the County legislative body "adopts the official county position on legal issues, RCW 36.32.120(6)," prosecutors "are required to advise the county board of commissioners or legislative authority on any matter concerning county affairs, RCW 36.27.020(1); and they are required to represent the county in all criminal and civil proceedings in which the county may be a party, RCW 36.27.020(3), (4))"). *See also Prentice v. Franklin County*, 54 Wash. 587, 591 (1909) ("The interests of the defendants in this litigation, prosecuted against Franklin county as the real party in interest, are subject to the orders and control of the board of county commissioners. . . .").

Executive, questioning whether "you need additional direction from the Council seeing that the ordinance has already passed the Council and has been signed by the Executive?"

2. **12:07 p.m.**: Chairman Roach also responded to the Prosecutor's email to explain that the "council is not asking for a lawsuit challenging the proposal."

3. **12:31 p.m.**: Councilmember Joyce McDonald provided a copy to the Prosecutor of her email to Chairman Roach wherein she again stated her belief that "since the measure was already passed by the Council and signed by the Executive, the decision on seeking to resolve the legal conflict would lie with the Executive branch."

4. **2 p.m.**: Chairman Roach conveyed to the prosecutor and others his similar belief that the issue was "between the Execs office and the prosecutors office" and asked the Prosecutor if the Council had a veto power despite the fact it "seems that once the exec signs an ordinance it's in her court."

5. **3:43 p.m.**: Councilmember Ladenburg sent an email to the Prosecutor, stating that the "Executive has requested that the Court determine the validity of the referendum and I support this request," but that "the Council is a body of seven separately elected members" so that "Chair Roach does not speak for the body of the Council without the approval of the majority of the Council" and "[s]ince we have not met on this matter, his comments are not representative of the majority."

6. **3:59 p.m.**: Councilmember Talbert sent an email to the Prosecutor stating "I support the executive's request for legal support from your office."

7. **Time unknown**: Councilmember Young called the Prosecutor by telephone to convey that he did not oppose the executive's decision to file suit.

8. **Time unknown**: Chairman Roach spoke with the Prosecutor, continued to decline to provide direction regarding filing the suit, and was advised that the Council's role includes controlling County litigation but due to the Executive's direction to file suit and the lack of any contrary direction from the Chairman, the suit had been or was in the process of being filed.

See CP 12-41, 64-66.

Because the Executive had requested the action be filed and neither the Council nor its chair after being notified had provided the Prosecutor direction, suit was filed at the end of the business day on February 27, 2015. *See* CP 24.[4] *See also Osborn,* 130 Wn.2d at 628 (a legislative body that "remains silent on a particular matter 'is bound by the bona fide representation of the county by the prosecuting attorney, who derives his primary authority, not from the board, but from the statutes.'") *(quoting Harter v. King Cty.,* 11 Wn.2d 583, 595, 119 P.2d 919 (1941)). When the Council meet in regular session a week and a half later on March 10, 2015, however, it voted to countermand the Executive's decision and directed the Prosecutor to dismiss the suit. CP 198-99 (3/10/15 PC Resolution No. R2015-31). *Compare* AB 7-8.[5]

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[4] The newspaper article Mr. West retyped and attached to his complaint quoted the March 2, 2014 Vanscoy email verbatim which confirmed that councilmembers had been advised: "In the absence of any imminent statutory or other time constraints to filing, there was no need for a rush to filing, and we believed it was proper and prudent to check in with Council before proceeding." *See* CP 272-73. The incorporated article further made clear that in seeking advice from the Prosecutor, Chairman Roach "did not indicate support for the lawsuit during his [February 28, 2015] conversation with prosecutors," and that the "decision to sue was made at the urging of the executive – even though it wasn't her decision to make … – and not by the council as a whole." *Id* (emphasis added).

[5] Mr. West's appellate brief wrongly claims, without factual support and contrary to the actual record, that "a majority of the 7 member council actively participated in deliberative email and/or telephone communications on the issue" of the Prosecutor filing suit and "the determination made in secret was ratified and approved in a formal resolution on March 10th." AB 7-8; *see also* record citations *supra*. at 4-5. Instead, when the Council met in regular session to finally vote on the issue, the Council's majority opposed the suit and directed the Prosecutor to dismiss it – while at the same time acknowledging the legality of the Prosecutor's filing due to the Council's previous silence on the matter. CP 198-99.

Though the complaint alleged other claims that Mr. West later abandoned, it included the assertion that he was making an "OPMA CLAIM." CP 270. [6] Among other things the complaint requested the court to: 1) declare that "a quorum of the Pierce County Commissioners violated the Open Public Meetings Act;" 2) declare "defendant [sic] Mark Lindquist violated the OPMA by deliberating conducting a series of secret serial meetings by telephone or electronic means;" and 3) bar "further violations of the OPMA upon paying of a $10,000 fine for each further violation" and that council-members who "knowingly violated the OPMA be fined the princely sum of $100." *Id.* [7]

On March 24, 2015, the individually named defendants filed an answer, CP 5-8, and because there was no genuine issue of material fact disputing that the court lacked jurisdiction over any named defendant,[8] that

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[6] The complaint's other listed "CAUSES OF ACTION," which were abandoned in the Superior Court as well as now on appeal, included the "UNIFORM DECLARATORY JUDGMENTS ACT (RCW 7.24)," and "WRITS OF MANDAMUS AND PROHIBITION." CP 270.

[7] By law, to obtain such monetary relief a plaintiff "must" produce evidence that – among other things – the member of the governing body "had knowledge that the meeting violated the" OPMA. *See, e.g., Wash. Pub. Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 902, 86 P.3d 835 (2004); *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 558, 27 P.3d 1208 (2001). Here, Mr. West did not challenge below, nor does he challenge now on appeal, dismissal of his claim for monetary damages against the individually named councilmembers since none believed they had "met." *See* CP 60-61; AB 9-10. Thus the dismissal of that claim is not in dispute on appeal.

[8] Jurisdiction was absent because the named individual councilmembers had not been served, *see* CP 50-51, 103-08, 111-12, 119-24, and because defendant "Pierce County Council" is not an entity capable of being sued, *see e.g. Nolan v. Snohomish County*, 59 Wn. App. 876, 883, 802 P.2d 792 (1990), *rev. denied,* 116 Wn.2d 1020, 811 P.2d 219 (1991) (county council was not a proper party because "in a legal action involving a county,

Mr. West lacked standing, and that his claims should be dismissed as a matter of law – on April 21, 2015, a motion for summary judgment under CR 56 was filed by defendants. *See* CP 44-63. As to the OPMA claim, the motion demonstrated: 1) the record and sworn declarations confirmed the Prosecutor did not facilitate "meetings" in which a "quorum of the Council took 'action'" but simply that legal advice was provided to councilmembers upon their request concerning the Council's legal role in filing County lawsuits and that no direction from a majority of the Council was given; 2) a prosecutor's legal consultation with councilmembers does not violate the OPMA; 3) the OPMA permits discussion among councilmembers concerning the subject of a potential special meeting; and 4) the contemporaneous email communications at issue and sworn declarations of the participants established there was no knowledge by councilmen that their communications were a "meeting" that would violate OPMA. CP 9-

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the county itself is the only legal entity capable of suing and being sued" so it "follows that a county council is not a legal entity separate and apart from the county itself"); *Foothills Dev. Co. v. Clark Cy. Bd. of Cy. Comm'rs*, 46 Wn. App. 369, 377 (1986) (county board of commissioners properly dismissed because it "is not a separate entity that has the capacity to be sued."); RCW 36.32.120(6) (granting the same authority to "[t]he legislative authorities of the several counties" as was formerly granted to "[t]he several boards of county commissioners"); RCW 36.01.020 ("The name of a county, designated by law, is its corporate name, and it must be known and designated thereby in all actions and proceedings touching its corporate rights, property, and duties.") Indeed, even now councilmembers Ladenburg and Talbert have never been served. *See* CP 281 These jurisdictional issues are not addressed by Mr. West on appeal, nor has he contested dismissal of the Council and councilmembers Ladenburg and Talbert, and thus those dismissals also are not in dispute on appeal.

41, 52-61, 64-68.

Mr. West's response to summary judgment addressed only the OPMA, and then opposed only some of the grounds for dismissal of that claim. CP 69-77. When defendants' reply identified the defects of Petitioner's selective opposition to summary judgment, *see* CP 111-118, Mr. West on the morning of the summary judgement hearing orally asserted he would file an affidavit of prejudice against the assigned judge and was granted permission to do so. *See* CP 183. Thus defendants were forced to re-note their summary judgment motion for the next available hearing date of September 18, 2015 – four months later. *See* CP 276 – 277.

On September 18, 2015, the Honorable Judge Erik D. Price dismissed the suit on the grounds Mr. West lacked standing and the communications at issue affirmatively established that a majority of the Council was not "considering deliberating on this issue" at the time in question. CP 224-25; 9/18/15 VRP 48-49.[9] On September 28, 2015, Plaintiff filed – but did not note – a "Motion for Reconsideration"/"Declaration" which addressed only his lack of "standing" to pursue an OPMA claim and for the first time attempted to identify facts he claimed supported his having standing. *See*

[9] In light of its ruling, the court held it unnecessary to address defendants' additional grounds for dismissal that jurisdiction was lacking and that legal consultations with the Council's attorney and the statutory allowance for "special meetings" did not violate the OPMA because they were specifically authorized by it. *See* 9/28/15 VRP at 41, 49.

CP 231-35. It was not until over two weeks later, on October 16, 2015, that Mr. West filed an unsigned notice of issue setting an October 23 hearing date for his reconsideration motion. *See* CP 248-50. Before that motion could be heard, Mr. West on October 19, 2015, filed a notice of appeal for both the order of summary judgment and the yet to be decided motion for reconsideration. CP 263-267. Two days later, on October 21, 2015, an order denying the motion to reconsider was entered, CP 260, but Mr. West never filed a notice of appeal for that order thereafter. *See also* AB 11.

It was not until the Clerk of the Court of Appeals "scheduled a motion for further sanctions because of [Mr. West's] failure to timely file the Appellant's Brief," *see* 4/24/16 Ponzoha Ltr, that Plaintiff on April 8, 2016, submitted "Appellant West's Opening Brief" which seeks to reverse only the dismissal of his OPMA claim. *See* AB 9-10. In so doing, Mr. West does not address his suit's and appeal's procedural defects but briefs only his lack of standing and failure to show a serial meeting in violation the OPMA. *Id.*

IV. ARGUMENT

A. WEST LACKS STANDING TO SUE UNDER THE OPMA

As a matter of law, "courts cannot be open to every citizen's objection to every action of our governmental representatives in the legislative or executive branches of government." *Coughlin v. Seattle Sch.*

Dist. No. 1, 27 Wn. App. 888, 893, 621 P.2d 183 (1980), abrogation on other grounds recognized by *State St. Office Bldg. v. Sedro Woolley Sch. Dist. No. 101*, 57 Wn. App. 657, 789 P.2d 781 (1990). Thus, a plaintiff bears the burden of establishing standing to sue. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Des Moines Marina Ass'n v. City of Des Moines*, 124 Wn. App. 282, 291, 100 P.3d 310 (2004). Here, Mr. West did not demonstrate he had standing to sue.

1. OPMA Does Not Abolish Requirement of Proving Standing

Mr. West argues he did not need to show standing to bring suit under the OPMA because RCW 42.30.130 states: "Any person may commence an action" under that statute. *See* AB 24. However, Plaintiff not only fails to cite any authority ever holding this language abolishes the fundamental jurisprudential requirement of standing, but refuses to mention defendants' previously cited precedent that holds proof of standing is required.

Washington's standing doctrine follows federal law. *See High Tide Seafoods v. State,* 106 Wn.2d 695, 702, 725 P.2d 411 (1986) (citing *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984); *Craig v. Boren*, 429 U.S. 190, 193–94, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)). Under Federal Law, even where the legislative branch purports to confer standing on all members of the public, a plaintiff still must demonstrate standing by proving he suffered an injury in fact rather than an injury to the public in

general. *Lujan*, 504 U.S. at 577–78. Thus, our State Supreme Court in *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn.2d 769, 771-72, 630 P.2d 930 (1981), holds a citizen has no standing under OPMA to sue over a public body's meeting that was held without notice because only a party who shows he has suffered an injury has standing to sue. Mr. West avoids any mention of this binding precedent and instead, for the first time claims on appeal that standing under OPMA should be as broad as standing under the Public Records Act so the trial "court erred and violated the doctrine of separation of powers in finding that a plaintiff asserting a cause of action under the OPMA is required to show particularized injury ….." AB 24-30. Neither of these untimely and evasive arguments withstand examination.

First, Plaintiff does not explain how he can properly assert these new arguments for the first time on appeal. *See, e.g., Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 728, 189 P.3d 168 (2008) ("we will not consider arguments not first raised below"); *Brower v. Pierce County*, 96 Wn. App. 559, 567, 984 P.2d 1036 (1999) ("[w]e will not consider arguments that are made for the first time on appeal"). Second, the PRA – like the OPMA – also "requires that a claimant must have a personal stake in the outcome of a case in order to bring suit." *Kleven v. City of Des Moines*, 111 Wn. App. 284, 290, 44 P.3d 887 (2002) (finding the "record amply supports Kleven's personal stake here"). *See also Cedar Grove Composting, Inc. v. City of*

Marysville, 188 Wn. App. 695, 710, 354 P.3d 249 (2015).

Third, and most importantly, Mr. West fails to explain how this Court can overrule our Supreme Court's *Kirk* precedent that requires proof of injury for a plaintiff to sue under the OPMA. *See e.g. State v. Stalker*, 152 Wn. App. 805, 811, 219 P.3d 722 (2009) (quoting *State v. Ray*, 130 Wn.2d 673, 677, 926 P.2d 904 (1996)) (absent *stare decisis* "the law ceases to be a system; it becomes instead a formless mass of unrelated rules, policies, declarations and assertions-a kind of amorphous creed yielding to and wielded by them who administer it. Take away stare decisis, and what is left may have force, but it will not be law.").

2. Trial Court Did Not Hold Division II's Unpublished Decision on Standing Was "Precedent"

Mr. West next claims the trial court's supposed "reliance upon unpublished 'precedent' requiring a scintilla of interest" for standing was "reversible error" under GR 14.1 and RCW 2.06.040. AB 31-32. He neither identifies the unpublished opinion at issue nor discloses that he was the plaintiff in that case wherein this Court rejected the same standing argument under the OPMA he makes now. *See* 9/28/15 VRP at 30, 50. In any case, Mr. West's brief again misstates the record and law.

First, the record is undisputed the trial court repeatedly made clear it did not consider Division II's decision against Mr. West in *West v.*

Marzano, 171 Wn. App. 1004 (2012) (unpublished), "precedent," but only that it was a "persuasive" analysis. *See* 9/28/15 VRP at 29-30, 43-44. Indeed, Plaintiff makes no attempt to dispute that the *Marzano* analysis mirrors the County's argument in this case because it also noted that *Kirk* had long ago held a demonstration of personal standing was required under the OPMA. Likewise, Mr. West does nothing to confront the reasoning of the *Marzano* decision, much less explain why its underlying rationale was somehow defective. Plaintiff cites no rule barring a trial Court from noting the existence of a rational – but non-precedential – legal reasoning.

Second, though not the basis for the trial Court's decision, as a matter of law Mr. West is legally bound by the holding in his *Marzano* action under the principle of collateral estoppel. *See e.g. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979) (collateral estoppel protects "litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation"); *Brownfield v. City of Yakima*, 178 Wn. App. 850, 870, 316 P.3d 520 (2014) (citing *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993)) ("Collateral estoppel bars relitigation of any issue that was actually litigated in a prior lawsuit."). Collateral estoppel applies here because it was undisputed there are: "(1) identical issues; (2) a final judgment on the merits; (3) the party against

whom the plea is asserted [was] a party to … the prior adjudication; and (4) application of the doctrine [does] not work an injustice on the party against whom the doctrine is to be applied." *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 418 (1989) (*quoting Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507 (1987)). *See also Hanson*, 121 Wn.2d at 562.

Thus, contrary to Mr. West's assertions, the trial court's decision was not "based upon inadmissible unpublished 'precedent'" nor did it violate "the explicit provisions of RCW 42.30.130 to the contrary." AB 32. Rather, the analysis applied by the trial court had been asserted earlier by defendants in this case without reference to *Marzano*, West was the losing party in that prior lawsuit addressing the same issue, and he was well aware of its rationale and its use before summary judgment was granted. Mr. West's responsibility to provide evidence of "standing" was not a surprise to him at summary judgment and the fact he had previously lost the same standing issue before this Court is certainly not a basis for an appeal here.

3. West Did Not Establish He Had Standing Under the OPMA

Though his lack of standing was raised by the named councilmembers half a year before summary judgment was ordered, *see* CP 52, 112-13, during that time Mr. West did not include any declaration in response to summary judgment that made any attempt to identify a personal

stake or harm to him. *See* CP 76. This continued even after defendants expressly argued prior to summary judgment that Mr. West "nowhere disputes that as a factual matter he does not reside in Pierce County or have any right, status or other legal relation that supposedly was affected by members of the Pierce County Council. See Ps' S.J. Resp. 2." CP 112. This fundamental failure of proof alone is fatal to Mr. West's OPMA claim as matter of law.

It was not until after summary judgment was granted, CP 226, that Mr. West moved for reconsideration solely on the issue of standing and finally filed a declaration that for the first time attempted to list grounds he claimed stated a cognizable interest in the OPMA claim at issue. CP 230-35. This new and untimely declaration was both too late and too little.

a. Reconsideration Declaration Not Properly Before Court

First, as a matter of civil procedure, a motion for summary judgment must be decided on the evidence before the court at the time of the motion – not on declarations filed after the entry of a formal order granting that motion. *See e.g. O'Neill v. Farmers Ins. Co. of Washington*, 124 Wn. App. 516, 522, 125 P.3d 134 (2004). Thus, under CR 59, it is improper to consider new evidence that was known to the parties but that was not presented to the court at summary judgment. *See e.g. Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland*, 95 Wn. App. 896, 977 P.2d 639 (1999); *Morinaga*

v. Vue, 85 Wn. App. 822, 935 P.2d 637 (1997). Here, the alleged facts asserted by plaintiff for the first time on reconsideration were known to him during the pendency of summary judgment but were not alleged until after his complaint was dismissed. Thus, as a matter of law, Mr. West's new declaration, filed after the summary judgment order was entered, provided no basis for reconsideration.[10]

Second, as a matter of appellate procedure, Mr. West cannot challenge the trial court's denial of reconsideration on the issue of standing because Plaintiff failed to timely appeal it. Under RAP 5.2(e), a notice of appeal regarding denials of reconsideration must be filed "within (1) 30 days after the entry of the order, or (2) if a statute provides … a time period other than 30 days after entry of the decision …." Here, no applicable statute provides a time period for appeal other than 30 days, and Mr. West's only notice of appeal was filed before the reconsideration motion was decided

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[10] An additional civil procedural defect here is CR 59(b) which expressly dictates:

> A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise.

(Emphasis added). Here, Mr. West did not note his motion at the time reconsideration was filed, but waited 28 days after summary judgement was entered. *See* CP 230, 248-50. Likewise, Mr. West did not have the matter heard or considered within 30 days after the entry of summary judgment, but noted it for more than a month thereafter. *See id*; CP 260. *See also e.g. Kaech v. Lewis County Public Utility Dist. No. 1*, 106 Wn. App. 260, 268, 23 P.3d 529 (2001) (because CR 59 "motion for a new trial was untimely, the trial court lacked authority to order a new trial"); *Metz v. Sarandos*, 91 Wn. App. 357, 360, 957 P.2d 795 (1998) (where reconsideration was sought 13 days after dismissal the "trial court had no discretionary authority to extend the time period for filing").

and not "within … 30 days after the entry of the order." *See* CP 260, 263.

b. A Timely Declaration Would Not Have Proved Standing

Even if the declaration had been filed before dismissal and the issue had been properly appealed, Mr. West still would not have demonstrated standing. Though Mr. West attempts to argue that the language of *United States v. SCRAP*, 412 U.S. 699, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), supposedly supports his claim of standing, *see* AB 36, he ignores that both the United States and our state Supreme Courts recognize the "viability of *SCRAP*'s commentary on standing [is] doubtful" because "its 'expansive expression of what would suffice for ... review under its particular facts has never since been emulated by this Court....'" *Allan v. Univ. of Washington*, 140 Wn.2d 323, 327-28, 997 P.2d 360 (2000) (quoting *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 889 (1990)). Indeed, both our highest Federal and State Courts have "declared *SCRAP* irrelevant for purposes of a motion for summary judgment because it involved a 'motion to dismiss on the pleadings'" which "'presumes that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (emphasis added); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Hence, on summary judgement, a "hypothetical argument" that a plaintiff "could [] someday" suffer an injury "is speculative and insufficient to establish standing." *Allan,* 140 Wn.2d at 329. Here, plaintiff's similar

hypothetical arguments are likewise insufficient to show standing.[11]

For example, Mr. West claims that because he travels to or through Pierce County in pursuit of his various lawsuits or other interests, he has "purchased retail goods and services in Pierce county [sic]" and pays sales taxes thereon so he might have been affected if construction of a new County building project had resulted in those taxes being raised. AB 32, 35. However: (1) there was no evidence that the now abandoned project would have been funded by an increase in the County sales tax Plaintiff allegedly paid when he passed through; (2) the decision to approve the County construction had been approved long before the time of the communications concerning the subject initiative, *see* CP 272; (3) those communications mostly concerned instead whether the Council had authority to oppose a citizen initiative against the already approved project, CP 21-38, 272-73; and (4) the Council later publically voted to direct the Prosecutor to dismiss the suit against the referendum. CP 24, 198-99. Thus Mr. West's speculative assertions did not show the communications at issue "prejudiced or [are]

[11] Mr. West summarily claims in passing that *West v. Secretary of the Department of Transportation*, 206 F.3d 920 (9th Cir. 2000), "found that West had standing to challenge a 10 Million Dollar Highway interchange in Pierce County." AB 37. He does not explain, however: 1) on what basis that case supposedly found he had standing; or 2) how such a supposed holding in a case claiming a federal environmental impact statement was necessary for a federal highway project applies to a state OPMA claim asserting members of a County Council must call a public meeting before its members can discuss whether they have power under state law to direct County litigation.

likely to prejudice" him, and he "fails to establish a concrete interest of [his] own that has been injured by the claimed procedural error" so that these allegations are insufficient to prove standing. *See Allan,* 140 Wn.2d at 328.

Second, Plaintiff also argues other civil actions in which he is or might later be involved could in unexplained ways somehow be impacted by his lack of standing to sue defendants in this action. *See* AB 33-35. His confusing declaration did not provide a discernable factual basis for how his lack of standing in this case is "likely to prejudice" him in other cases, nor does he provide a legal rationale why an inability to pursue other actions should influence the analysis of his lack of standing in this action.

Thus, even if Mr. West had raised these assertions earlier, they would not have resulted in a different outcome on summary judgment.

B. WEST FAILED TO PROVE A VIOLATION OF THE OPMA

Mr. West claims an OPMA violation occurred because he argues "a majority of the Pierce County Council participated in covert serial email and telephone conversations to make a decision and take an action, which action later came before the council for a vote and was ratified in a formal public meeting." AB 12. To prevail, however, it was not enough for Plaintiff to file a complaint making allegations "as reported in the media," CP 268, rely on inadmissible evidence and summarily misstate it in opposing summary judgment and in pursuing an appeal. *Compare supra.* pp. 1-6 *with*

AB 10-12.[12]

As a matter of law, a party moving for summary judgment meets its burden "by 'showing' – that is pointing out ... that there is an absence of evidence to support the nonmoving party's case." *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989), overruled on other grounds, 130 Wn.2d 160, 922 P.2d 69 (1996) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). *See also Tender v. Nordstrom*, 84 Wn. App. 787, 791, 929 P.2d 1209 (1997) (defendant's burden on summary judgment "may be met by pointing out that there is an absence of evidence in support of the nonmoving party's case"). Thereafter judgment is properly granted where a plaintiff then "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Young*, 112 Wn.2d at 225 (citing *Celotex*, 477 U.S. at 322). In other words:

> A defendant in a civil action is entitled to summary judgment when that party shows that there is an absence of evidence supporting an element essential to the plaintiff's claim. The

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[12] For example, Mr. West quotes a supposedly "previously withheld document" from "County Deputy Prosecutor Vanscoy" and a "subsequent statement prepared for Pierce County Council Chair Dan Roach." AB 15. However, DPA Vanscoy's supposedly "withheld" email is the same email long ago described in the news article Mr. West had attached to his complaint and quoted verbatim the same language Appellant's Brief quotes again. *Compare* AB 15 *with* CP 273. As to the "statement prepared for" the Chair by an unidentified person, Mr. West fails to disclose that – in an unappealed separate September 18, 2015 order, *see* AB 12 – the document was stricken because it: (1) was not shown based on personal knowledge but inadmissible hearsay; (2) was unauthenticated; (3) included legal conclusions; and (4) was irrelevant. CP 215-25, 263; 9/18/15 VRP 39-41.

> defendant may support the motion by merely challenging the sufficiency of the plaintiff's evidence as to any such material issue. In response the nonmoving party may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists.

Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 198, 831 P.2d 744 (1992). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (on summary judgment a "scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."); *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 736, 150 P.3d 633 (2007) ("if . . . the non-moving party, can only offer a 'scintilla' of evidence, evidence that is 'merely colorable,' or evidence that 'is not significantly probative,' the plaintiff will not defeat the motion.")

Here, as "point[ed] out" above and below, "there is an absence of evidence to support the nonmoving party's case" and, therefore, dismissal of the complaint was proper as a matter of law. *See Sligar v. Odell*, 156 Wn. App. 720, 731, 233 P.3d 914 (2010) (where "plaintiff fails to present evidence to prove each essential element of the … claim, then summary judgment for the defendant is proper").

1. No Evidence A Council Majority Had A "Serial Meeting"

Mr. West argues the facts show "a textbook case of serial communications between a quorum of the exact type discussed in *Wood v.*

Battle Ground School District, 107 Wn. App 550, 27 P.3d 1208 (2001) and the cases from California, Nevada, and Florida cited by the Court in *Wood* to support its decision." AB 13. In fact, summary judgment was granted because the cited authority and record demonstrate precisely the opposite.

As to the law, Mr. West's argument ignores the actual holding of *Wood* and choses instead to misinterpret both its passing reference at 107 Wn. App. at 563 to out-of-state decisions and his own cited out of state cases. AB 16-17. Specifically, Plaintiff relies on *Wood*'s citation to *Stockton Newspapers, Inc. v. Members of the Redevelopment Agency*, 214 Cal.Rptr. 561, 565 (Cal. Ct. App. 1985), claiming it "expressly rejected the same type of argument made by the County in the present case." *See* AB 16-18. Not only are the facts of *Stockton* inapposite to those here,[13] that case affirmatively held that a claim under California law – as does a claim under Washington law – requires a legislative "action" that is taken at a "meeting" by "a majority of the legislative body" for "the commonly agreed purpose of collectively deciding" a legislative function such as approving "transfer

[13] *Wood* explained it had been alleged in *Stockton Newspapers* that there was a "series of telephone calls between individual members and [an] attorney to develop [a] collective commitment or promise on public business" in violation of California law. 107 Wn.App. at 563. More specifically, *Stockton* held a claim would be stated under California law if it was alleged that "action" had been taken at a "meeting" by "a majority of the legislative body" through "a series of one-to-one nonpublic and unnoticed telephone conversations with the agency's attorney for the commonly agreed purpose of collectively deciding to approve the transfer of ownership in redevelopment project property." *See* 214 Cal.Rptr. at 566 (emphasis added). The record here is far different. *See discussion supra.* at 4-5.

of ownership in redevelopment project property." *See* 214 Cal.Rptr. at 566. The other out-of-state cases interpreting different statutes cited by *Wood*[14] and by Plaintiff[15] similarly fail to support Mr. West's allegation that he can ignore the requirements for a "serial meeting" claim imposed by *Wood*.[16]

Turning to the actual holding of *Wood*, that is nowhere mentioned by Mr. West, a "serial meeting" claim under the OPMA requires: 1) "a majority of the governing body" must meet; 2) those "participants must collectively intend to meet to transact the governing body's official business"; and 3) they then "must take 'action' as the OPMA defines it." *Wood*, 107 Wn. App. at 565 (emphasis added). Noting that California

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[14] *Compare id.* at 563 *with Del Papa v. Bd. of Regents of the Univ. & Cmty. Coll. Sys.*, 114 Nev. 388, 956 P.2d 770 (Nevada 1998) ("a quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law" but "in the absence of a quorum, members of a public body can[] privately discuss public issues or even lobby for votes.") (emphasis added); *Blackford v. Sch. Bd. of Orange County*, 375 So.2d 578, 580 (Fla. Dist. Ct. App. 1979) (addressing "six de facto meetings by two or more members of the [three member] board at which official action was taken.") (emphasis added).

[15] *Compare* AB 18-20 *with*; *McComas v. Bd. of Educ. of Fayette County*, 475 S.E.2d 280, 290 (W. Va. 1996) (test for a violation of West Virginia's law requires evidence of "the content of the discussion, the number of members of the public body participating, the percentage of the public body that those in attendance represent, the significance of the identity of the absent members, the intentions of the members, the nature and degree of planning involved, the duration of the meeting and of the substantive discussion, the setting, and the possible effects on decision-making of holding the meeting in private."); *Smith County Education Association v. Anderson*, 676 S.W.2d 328, 334 (Tenn. 1984) (even though "Board met privately, without notice, with its attorney" as a matter of law "discussions between a public body and its attorney concerning pending litigation are not subject to the Open Meetings Act.") (emphasis added).

[16] Our state Supreme Court recently noted it has never "reach[ed] the issue of whether such a serialized sequence of communications can ever constitute a 'meeting' under OPMA." *Citizens*, 184 Wn.2d at 448 (emphasis added).

Courts recognize that "[r]equiring all discussion between members to be open and public would preclude normal living and working by officials," *id.* at 564 n.6 (*quoting Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 69 Cal.Rptr. 480, 487 n. 8, 263 Cal.App.2d 41 (1968)), *Wood* likewise recognizes "the need for balance between the right of the public to have its business conducted in the open and the need for members of governing bodies to obtain information and communicate in order to function effectively." 107 Wn. App. at 564. In the same way that he ignores Washington's test for his cause of action, Mr. West also ignores both the "need for balance" and that the facts of record establish the test's essential elements are absent as a matter of law.

First, the record is undisputed that a "majority of the governing body" did not "collectively intend to meet to transact the governing body's official business." *See e.g. Citizens All. for Prop. Rights Legal Fund v. San Juan Cty.*, 184 Wn.2d 428, 443-44, 359 P.3d 753 (2015) ("members of a governing body 'must collectively intend to meet to transact the governing body's official business' for their communications to constitute a meeting.") (quoting *Wood*, 107 Wn. App. at 565 and citing 1971 444 Op. Att'y Gen. No. 33, at 19) (emphasis added). Of the seven members of the Pierce County Council, two were merely passive recipients of two emails from Chairman Roach that were sent to all council members. CP 9-11, 67-68. As a matter

of law, "passive receipt of e-mail does not automatically constitute a 'meeting.'" *Id.* at 564; *Wood*, 107 Wn. App. at 564. As to the remaining five council members who did communicate with the prosecutor by email, the declarations and related contemporary documents of all demonstrate that none believed a "meeting" had been held, much less that they intended to transact the council's business thereby. *See* CP 12-20, 39-41, 64-66.

Indeed, the contemporary emails of three of those five – *i.e.* Council Chairman Roach and Councilmember McDonald to each other, and Councilmember Ladenburg to DPA Vanscoy – confirm they believed the matter at issue was not the Council's business and therein expressly noted that "we have not met on this matter" and that "the decision on seeking to resolve the legal conflict would lie with the Executive branch" and not the Council. *See* CP 26 (2/27/15 12:31 p.m. McDonald email, 2/27/15 2 p.m. Roach email), CP 36 (2/27/15 3:43 p.m Ladenburg email). Thus both the sworn declarations of all the council members, and *contemporary documents* of three of the five who responded, affirmatively disprove any claim that a "majority of the governing body" (i.e. four of the seven members) "collectively intend[ed] to meet to transact the governing body's official business." *See also Citizens*, 184 Wn.2d at 445 ("record does not indicate that a majority of council members had a collective intent to meet during the e-mail and telephone exchange that CAPR cites.").

Second, a "majority of the governing body" also did not "take 'action' as the OPMA defines it" and as *Wood* expressly requires for such a suit. The OPMA defines "action" as "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." RCW 42.30.020(3). The declarations of all seven council members confirm there was no "receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations [or] final actions" among the required "majority of the governing body" concerning whether the proposed referendum lawsuit should be filed. *See* CP 9-20, 39-41, 64-68. In addition to this sworn testimony, the face of the contemporaneous emails of the five responding councilmembers confirm that the concern of most was that the County's filing a challenge to the referendum was a not a matter for deliberation, discussion, consideration, review, evaluation or final action by the Council. *See e.g.* Vanscoy Dec: CP 26 (2/27/15 12:32 p.m. McDonald email, 2/27/15 2 p.m. Roach email).

Third, these sworn declarations and contemporaneous emails, *see id.*, also confirm there was no "final action" in the communications by the council because such requires "a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or

ordinance." *See* RCW 42.30.020(3). Here, it is undisputed that before the suit was filed there was never "a collective positive or negative decision" even about whether council members could decide whether the proposed lawsuit should be filed – much less that "a majority of the members of a governing body" ever took "an actual vote" about filing it. There being neither a "collective positive or negative decision, [n]or an actual vote by a majority of the members of a governing body," as a matter of law there could be no "action" or "final action" by the Council "as the OPMA defines it." Thus, there can be no claim for a supposed "serial meeting" of its members.

Because he failed to demonstrate any – much less all – of the required elements of an OPMA cause of action, Mr. West's suit was properly dismissed. His refusal even to mention those essential elements on appeal does not remedy this fatal defect but confirms that defect's presence.

2. Council's Later Vote Directing Suit's Dismissal Does Not Bar the Court From Relying on the Record

Mr. West next summarily asserts that the Council's later officially "ratifying and confirming the filing of the lawsuit should be seen to estopp the County from disputing that the Council approved the filing of the lawsuit." AB 16. However, he fails to provide any rationale for why the Court should ignore the record but states only that doing so somehow

"would be in accord with *Finch v. Matthews*, 74 Wn.2d 161, 175, 443 P.2d 833 (1968), and *Kramarevsky* [sic] *v. DSHS*, 122 Wn.2d. 738 [sic] 743 [sic] 863 P 2d 535, [sic] (1992)." *Id.* A review of the cases cited by Plaintiff show otherwise.

Specifically, *Finch* held that a city could not assert a superior property right because equitable estoppel was "necessary to prevent a manifest injustice and the exercise of its governmental powers will not be impaired thereby." *See* 74 Wn.2d at 175. Further, *Kramarevcky* held the State could not recoup public assistance benefits when there was not "clear, cogent and convincing evidence" of: "(1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." 122 Wn.2d. at 743-44.

Here, by defendants relying on the record, there was no attempt to obtain property or monetary benefits. Likewise there is no argument by Mr. West – much less "clear, cogent and convincing evidence" – that: (1) a later public vote by the Council is inconsistent with the defense that a majority of councilmembers had not previously met to take that action in secret; (2) disregard of the facts of record somehow will "prevent a manifest injustice;" and (3) there is some "admission, statement or act inconsistent with"

defendants' "later claim." Similarly there is no claim Mr. West somehow acted "in reliance on the first party's act, statement or admission," and that some "injury … would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." *See also* CP 24. Further, as both *Finch* and *Kramarevcky* recognize: "Equitable estoppel against the government is not favored." *See Finch*, 74 Wn.2d at 169; *Kramarevcky*, 122 Wn.2d. at 743.

Mr. West's cryptic, off-hand assertion of equitable estoppel is unsupported by argument, fact, or law. *See* RAP 10.3(a)(6), RAP 10.4(f); *Joy v. Department of Labor and Industries*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012) ("Other than this conclusory statement, she provided no further argument or citation to authority establishing that she had some sort of vested or substantive right under" a particular legal theory). Such "'[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration,'" because by "making bald assertions lacking cited factual and legal support, West has failed to present developed argument for our consideration on appeal." *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (alteration in original) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)).

3. Other Grounds for Affirming Dismissal Also Are Present

The trial court concluded Plaintiff's failure to meet the tests for

standing and for a serial meeting claim under the OPMA meant "there is no need to reach" the additional grounds for dismissal asserted by the councilmembers. *See* 9/18/15 VRP 49. Nevertheless, those additional issues remain as additional grounds for upholding the dismissal on appeal. *See e.g.*, *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985) (judgment of a trial court can be affirmed "on any theory, although different from that indicated in the decision of the trial judge").

Dismissal of the OPMA also can be sustained on the statutory grounds that a prosecutor's legal consultation with councilmembers does not violate the OPMA and that the OPMA permits discussion among councilmembers concerning the subject of a potential special meeting. Mr. West chose not to respond to these issues below or now on appeal. *See generally* AB; 9/18/15 VRP 34-35. However, he could not defeat summary judgment, or now have an order of dismissal overturned on appeal, by failing to brief all the grounds supporting the order granting summary judgment.

a. Prosecutor's Legal Consultation With Councilmembers Does Not Violate The OPMA

The communications between the Prosecutor and Council members constitute attorney/client communications that are not subject to the OPMA. As the *Stockton* decision cited by *Wood* expressly notes, it found a violation

there because "the single purpose of the communications with the attorney is a legislative commitment" to "approve the transfer of ownership in redevelopment project property" and because it was not a "legal consultation regarding a threatened or pending lawsuit ...." *See* 214 Cal.Rptr at 566 (emphasis added).

Indeed, *Stockton* cited *Sutter Sensible Planning, Inc. v. Board of Supervisors*, 176 Cal. Rptr. 342, 348 (Cal. Ct. App. 1981), which expressly held that even though California's statute at that time "does not explicitly except attorney-client communications between a public agency and its counsel from the requirement that 'all meetings' be 'open and public,'" it also did "not abrogate the statutory policy, expressed in the evidentiary privilege of attorney-client confidential communications ..., assuring the opportunity for private legal consultation, by public as well as private clients" because in "legal strife" the government is not "a second-class citizen." A governing body's consultations with legal counsel on litigation matters are exempt since:

> "Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. .... There is a public entitlement to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned." .... If the public's 'right to know' compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted

> to capitalize on every revelation of weakness. A lawyer worth his salt would feel a sense of treachery in disclosing that kind of appraisal. (8 Wigmore (on Evidence (McNaughton rev. 1961)) s 2291, p. 553.) To him its conduct in public would be shocking, unprofessional, unthinkable.

Sutter, 176 Cal.Rptr. at 348 (quoting *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* 69 Cal.Rptr. 480, 490-91 (Cal. Ct. App. 1968)).

Accordingly, citing the principles above, our state's Court of Appeals holds that Washington's "open meeting law and the attorney-client privilege may co-exist" because "[w]hen a communication is confidential and concerns contemplated or pending litigation ..., the necessity for the attorney-client privilege exists as between a public agency and its lawyers to as great an extent as it exists between other clients and their counsel." *Port of Seattle v. Rio*, 16 Wn. App. 718, 724-25, 559 P.2d 18 (1977) ("We hold the instant case is an appropriate use of this exception to the Open Public Meetings Act of 1971.").

Indeed, separate and apart from the protection of attorney-client confidences under RCW 5.60.060(2)(a), *Wash. Pub. Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 902-03, 86 P.3d 835 (2004), held the OPMA's specific statutory provisions preclude any violation when "litigation conferences were privately conducted" with an attorney. Because RCW 42.30.110(1)(i) "permits executive sessions for governing bodies

when discussing litigation or potential litigation if public knowledge regarding the discussion is likely to result in adverse legal or financial consequences," the court held the "litigation management role requires the privacy and confidentiality of the attorney client relationship for the" municipality's benefit. *Id.* at 903. Thus, any discussion between the Prosecutor and a majority of council members concerning potential litigation also would be protected under the OPMA itself because public knowledge regarding the discussion could result in an adverse legal or financial consequence.

One such adverse legal consequence of requiring the legal consultation here to be made public would be that, as noted above: "Effective aid is impossible if opportunity for confidential legal advice is banned." *Sutter*, 176 Cal.Rptr. at 348. *See also Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 742, 174 P.3d 60 (2007) ("The necessity for protection of attorney work product does not diminish because an attorney represents a government agency" because "[r]egardless of who the client is, 'the attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears.'") (quoting *Rio*, 16 Wn.App. at 724-25; *Sacramento Newspaper*, 69 Cal.Rptr. at 490-91). Public knowledge of legal consultation with the Council would discourage the Prosecutor from providing the Council candid and complete legal advice

out of concern such advice would be communicated to the anticipated defendant who would be "delighted to capitalize on every revelation of weakness." *See Rio*, 16 Wn. App. at 725 (quoting *Sacramento Newspaper*, 69 Cal.Rptr. at 490-91.) Such discussions between a governing body and its attorney regarding potential litigation do not violate the OPMA unless an agency knows "beforehand that the discussion is benign and will unlikely result in adverse consequences" because a "candid discussion with counsel of the legal risk and consequences of potential litigation is specifically contemplated" in the OPMA. *In re Recall of Lakewood City Council Members*, 144 Wn.2d 583, 586-87, 30 P.3d 474 (2001).

Advance public knowledge here also had a likelihood to "result in an adverse legal [and] financial consequence" of another kind. By giving the proposed defendant in the County suit notice of the forthcoming action and thereby giving him an opportunity to avoid service of process – and thus delay initiation of the suit until it was too late to timely challenge the referendum – County taxpayers could suffer the financial consequences of losing the benefit of the soon to expire lower contract costs caused by a delay in resolving the legality of the referendum. *See* CP 21-23. Under these facts, the OPMA would not be violated even by serial meetings conducted by "a majority of the governing body" who "collectively intend to meet to transact the governing body's official business" by discussing potential

litigation without voting thereon. This is so because where the governing body merely "discuss[es] with legal counsel representing the agency" in "potential litigation" about bringing a challenge to an invalid referendum, it has been shown that advance public notice would be "likely to result in an adverse legal or financial consequence to the agency." *See* RCW 42.30.110(1)(i). Thus even if the facts were different and Mr. West's media report based allegations were correct, the conversations still would not violate the OPMA.

Indeed, our Supreme Court in *In re Recall of Lakewood City Council Members, supra.*, held that when a city manager similarly "asked the council to go into executive session to discuss his decision to join the lawsuit, and to give the council members an opportunity to discuss with counsel the advantages, disadvantages, and risks of various courses of action," and the governing body "did not block the city manager's decision to join the Initiative 695 lawsuit," then "this discussion fell within the attorney/client privilege exception and the council members were not in violation of the Open Public Meetings Act for meeting in executive session." (Emphasis added). What a council in *In re Recall of Lakewood City Council Members* could do when all councilmembers were physically present in an "executive session," is not somehow made unlawful if instead it had been conducted serially by email.

b. OPMA Permits Discussion Among Councilmembers About The Subject Of A Proposed Special Meeting

At the trial court and now on appeal, Mr. West also refused to address that even when a "majority" of the Council decides it does wish to review the merits of the County filing a lawsuit, no violation of the OPMA would occur even if members consult with one another by electronic "serial meetings" about whether to call a special meeting on that topic.

Mr. West has never acknowledged defendants' analysis of RCW 42.30.080(1) of the OPMA on this issue or the statute's following language:

> A special meeting may be called at any time by the presiding officer of the governing body of a public agency or by a majority of the members of the governing body by delivering written notice personally, by mail, by fax, or by electronic mail to each member of the governing body. . . .

(Emphasis added). *See also* PCC 1.28.040B ("Special Meetings of the Council shall be called pursuant to RCW 42.30.080."). Mr. West likewise fails to mention that the related RCW 42.30.080(3) further provides:

> The call and notices required under subsections (1) and (2) of this section shall specify the time and place of the special meeting and the business to be transacted. Final disposition shall not be taken on any other matter at such meetings by the governing body.

(Emphasis added). Hence, Plaintiff has never responded to Defendants' argument that:

> By authorizing a majority of the governing body to call a special meeting about specific "business to be transacted,"

> the OPMA impliedly authorizes councilmembers to engage in a preliminary discussion (and even vote, i.e., "majority") concerning the need for and scope of the proposed special meeting. Otherwise, it would be impossible for the majority of the body to exercise the statutory authority to call a special meeting, and RCW 42.30.080 "Special meetings" would be rendered meaningless in that regard.

CP 56.

Thus, Plaintiff has never disputed that the OPMA expressly authorizes a majority of the Council to discuss by email having a special meeting "at any time" before it is held. Since the notice for any such special meeting thereafter must "specify … the business to be transacted," the OPMA also contemplates a threshold discussion beforehand about the special meeting's topic since it expects a majority will be considering calling a meeting about something – and will already have decided what that "something" will be. Mr. West has had no answer to the fact that in order for a majority to consider whether to call a special meeting it must have a threshold discussion of the business to be transacted therein. Thus, such discussions as alleged here would have been in fulfillment – not violation – of the OPMA.

Here, even under Mr. West's baseless narrative, nothing more existed than a threshold discussion about whether the proposed lawsuit was an issue about which the Council should publically meet and vote. Because the Council is not required to call a "meeting" to discuss whether it should

call a "meeting," the discussion alleged here did not state an OPMA violation as a matter of law for this reason as well.

V. CONCLUSION

Mr. West failed to demonstrate standing to sue, erroneously named as a defendant the non-legal entity "Pierce County Council," neglected to serve two of the named councilmembers, and did not demonstrate under the law or record how any defendant violated the OPMA. For these reasons, summary judgment was proper and it is respectfully suggested that the order of dismissal should be affirmed.

DATED: this 9th day of May, 2016.

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CERTIFICATE OF SERVICE

On May 9, 2016, I hereby certify that I electronically filed the foregoing RESPONDENT PIERCE COUNTY COUNCIL'S BRIEF with the Clerk of the Court and I delivered the same via electronic mail pursuant to the agreement of the parties to:

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s/ CHRISTINA M. SMITH
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PIERCE COUNTY PROSECUTOR

May 09, 2016 - 2:15 PM

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